
(2009) 02 MP CK 0029
In the Madhya Pradesh High Court

Shyam Singh and Two Ors. and Mahesh Kumar	APPELLANT
Vs	
State of Madhya Pradesh	RESPONDENT

Date of Decision : 17-02-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 149, 300, 302

Citation : (2009) ILR (MP) 2415 : (2010) 1 JLJ 97

Hon'ble Judges : Sushma Shrivastava, J;Arun Mishra, J

Bench : Division Bench

Judgement

Sushma Shrivastava, J.—This judgment shall govern the disposal of Criminal Appeal No. 742/93 and Criminal Appeal No. 717/94 arising out of judgments passed by Additional Sessions Judge, Sohagpur, in S.T. No. 130/88 convicting the appellants u/s 302/34, 324/34 of IPC and sentencing them to life imprisonment with fine of Rs. 1,000/- and rigorous imprisonment for two years respectively. Being aggrieved by their conviction and order of sentence, appellant Shyam Singh, Kamlesh and Munna @ Bhawani have preferred Criminal Appeal No. 742/93, whereas appellant Mahesh Kumar has preferred Criminal Appeal No. 717/94.

2. According to prosecution, on 26.3.88 about 10 "O'clock in the morning at village Jamada, when complainant Kunjilal was fencing his "khalihan", appellants Shyam Singh, Mahesh, Kamlesh and Munna @ Bhawani armed with axe, lathi and kharedua came there on a tractor and appellant Shyam Singh said that he would make his "khalihan" there. When complainant Kunjilal told him that he was making his "khalihan" there for last three years, appellant Shyam Singh said to chop off his limbs. Thereupon appellant Kamlesh gave an axe blow on his occipital region, appellant Shyam Singh gave another axe blow on his right leg, while appellant Munna assaulted him with kharedua on his left leg. When his father Ishwar Singh, tried to intervene and rescue him, appellant Kamlesh gave an axe blow on the right side of the scalp of Ishwar Singh. Appellant Shyam Singh also gave an axe blow on the left side of his ribs, while appellant Mahesh

gave lathi blow on his chest. As a result of injuries inflicted on him, Ishwar Singh fell unconscious. Upon hue and cry, Baijnath, Madhav, Jeevan and Halkori reached there; then appellants fled away.

3. The FIR of the incident was lodged by complainant Kunjilal at Police Station Pipariya, on the basis of which an offence was registered against the appellants and was investigated. Injured Kunjilal and Ishwar Singh were sent for medical examination. Ishwar Singh, however, succumbed to his injuries in the hospital. The intimation of his death was given to the Police from the hospital, whereupon merg intimation was recorded and merg inquest report was prepared. The dead body of Ishwar Singh was sent for postmortem examination. Blood stained earth and plain earth were seized from the spot. Spot map was drawn. Blood stained clothes of deceased Ishwar Singh as well as of injured Kunjilal were also seized. The axe, lathi and kharedua used in the commission of offence were seized at the instance of appellants Shyam Singh, Kamlesh, Munna and Mahesh respectively. After due investigation, appellants Shyam Singh, Kamlesh, Munna @ Bhawani, Mahesh Kumar and two others were prosecuted u/s 147, 148, 149, 307 and 302 of IPC and were committed for trial. Co-accused Seetaram and Bagdar @ Dilip were, however, discharged by the Sessions Court vide order dated 26.3.92. Appellants Shyam Singh, Kamlesh, Munna @ Bhawani, and Mahesh were charged u/s 302/34 and 307/34 of IPC.

4. Appellants abjured the guilt. According to appellants, complainant Kunjilal and Ishwar Singh (deceased) armed with axe and lathi came to their "khalihan" and tried to make their own "khalihan" over there; when they objected, they assaulted them.

5. Learned Additional Sessions Judge, after trial and upon appreciation of the evidence adduced in the case, found the appellants guilty u/s 302/34, 324/34 of IPC for causing death of Ishwar Singh and injury to Kunjilal, convicted and sentenced them as aforesaid by the impugned judgment, which has given rise to these two appeals.

6. We have heard learned Counsel for the parties.

7. Learned Counsel for the appellants submitted that the trial court gravely erred in placing implicit reliance on the unreliable testimony of interested and partisan witnesses without any independent corroboration and failed to appreciate that the so-called eyewitnesses had not actually seen the incident, but they were introduced as eyewitnesses by Investigating Officer after recording their statements after lapse of a month. Learned Counsel for the appellants also submitted that the trial court failed to consider that the appellants had gone to make their own "khalihan" and had no intention to kill the deceased or to cause injury and they acted in the exercise of right of private defence. It was also submitted that the case would not travel beyond the ambit of Section 304 of IPC.

8. Learned Counsel for the State, on the other hand, supported and justified the conviction of the appellants as recorded by the trial court.

9. We have gone through the entire evidence. It is clearly borne out from the medical evidence that deceased Ishwar Singh (hereinafter referred to as "deceased") met a homicidal death. Dr. R.C. Agrawal (P.W-16), who conducted the medical examination of the deceased prior to his death and also conducted his postmortem examination after death, found following antemortem injuries on his person:

1. Incised wound of 3" x 1/4" x scalp deep over parietal region on right side of head, horizontal in direction.
2. Incised wound of 1 3/4 x 1/8" x skin deep over lateral aspect of chest on left side, oblique in direction.
3. Contusion of 1" x 7" over chest on left side.

10. On internal postmortem examination of the deceased, a depressed fracture on his right parietal bone of the skull was found and brain membrane was also torn. In the opinion of Dr. R.C. Agrawal (P.W-16), injuries No. 1 and 2 were caused by sharp cutting object and injury No. 3 was caused by blunt object and the cause of death was coma due to head injury and the death was homicidal in nature. The detailed postmortem report (Ex.P-28) of the deceased as well as his MLC report (Ex.P-25) are also placed on record. There are no reasons to disagree with the aforesaid medical evidence and the opinion of Dr. R.C. Agrawal (P.W-16) that deceased met a homicidal death.

11. It is also evident from unchallenged testimony of Dr. R.C. Agrawal (P.W-16) that on the medical examination of complainant Kunjilal on 26.3.88 various injuries including injuries caused by sharp edged weapon were found on his person as per his MLC report (Ex.P-26). Complainant Kunjilal (P.W-2) was thus an injured eyewitness; his presence on the scene of occurrence, therefore, could not be doubted.

12. The conviction of the appellants is founded on the testimony of complainant Kunjilal (P.W-2) and the other three eyewitnesses, namely, Harisingh, (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10). Complainant Kunjilal (P.W-2) deposed in his evidence that on the day of occurrence when he was preparing his "khalihan", appellants Shyam Singh, Mahesh, Kamlesh and Munna @ Bhawani and two others came there by tractor and questioned him how he was making "khalihan" there. When complainant told them that he was making "khalihan" there for last three years, appellant Shyam Singh said to chop off his limbs. Appellants Kamlesh and Shyam Singh then gave axe blows to him causing injury on his scalp and right leg, whereas appellants Munna @ Bhawani and Mahesh assaulted him by means of kharedua (a wooden object) and lathi. According to complainant Kunjilal (P.W-2), when his father Ishwar Singh rushed to rescue him, appellant Kamlesh gave an axe blow on the right occipital region of his father. Appellant Shyam Singh gave an axe blow on the left side of his ribs, while appellant Munna assaulted on his head with kharedua and appellant Mahesh gave a lathi blow on his chest; as a result, his father fell down and became

unconscious. Complainant Kunjilal (P.W-2) further deposed that when Baijnath, Jeevan and Halkori came there to rescue them, appellants fled away on their tractor; thereafter, Harisingh, Leeladhar and Patel took him and his father to Police Station Pipariya, where he lodged the FIR (Ex.P-4) and they were sent to hospital, where his father expired.

13. Harisingh (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10) also tried to support the aforesaid version and deposed that when they reached the place of occurrence they saw that appellants Kamlesh and Shyam Singh had assaulted the deceased by axe, appellant Mahesh gave a lathi blow on his chest, while appellant Munna assaulted the deceased by kharedua.

14. The main thrust of the submission of learned Counsel for the appellants has been that the so-called eyewitnesses Harisingh (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10) had never witnessed any assault on the deceased and they have given a cooked up version that they saw the four appellants assaulting the deceased, which is also indicated by the fact that their names were not mentioned in the FIR (Ex.P-4) and their statements were also recorded by Police after about a month. Reliance was placed in this behalf on the decisions of the Apex Court in the case of Ganesh Bhavan Patel and Another Vs. State of Maharashtra, and Ram Kumar Pandey Vs. State of Madhya Pradesh, .

15. We find some force in the aforesaid submission of learned Counsel for the appellants in view of the fact that the presence of three witnesses, namely, Harisingh, (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10) on the scene of occurrence is not reflected in the FIR (Ex.P-4) lodged soon after the occurrence, whereas the other four eyewitnesses were specifically named in the FIR, which cast a cloud of suspicion over the testimony of the aforesaid three witnesses that they actually witnessed the appellants assaulting the deceased. Even otherwise, their version in this behalf appears to be doubtful for the reason that, according to Harisingh (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10), they reached the place of occurrence after getting the information regarding quarrel in the "khalihan" and, therefore, it becomes highly doubtful and unnatural that by the time they reached the "khalihan" they would have seen the four appellants still assaulting the deceased. Leeladhar (P.W-10) also clearly deposed that when they reached the place of occurrence, appellants were fleeing by the tractor and all these three persons, as their evidence indicates, had reached the place of occurrence together. Thus, in view of the statement of Leeladhar (P.W-10), the statement of the aforesaid three eyewitnesses that they had seen the four appellants assaulting the deceased, cannot be believed and deserves to be discarded.

16. However, there are no reasons to ignore the evidence of complainant Kunjilal (P.W-2), who is an injured eyewitness. Although the evidence of complainant Kunjilal also suffers from some embellishment in as much as he had attributed kharedua blow to appellant Munna in causing injuries to the deceased, while there was no such averment made in the FIR (Ex.P-4) lodged by him that

appellant Munna assaulted the deceased by kharedua on his scalp, but that cannot be a ground to reject his entire evidence. Apposite to add that the remaining part of his evidence is essentially consistent with the contents of FIR (Ex.P-4), as also corroborated by the medical evidence. In fact, there are no reasons to disbelieve the statement of complainant Kunjilal (P.W-2) to the effect that when his father Ishwar Singh (deceased) tried to rescue him, appellant Kamlesh gave an axe blow on the scalp of his father on right side and appellant Shyam Singh gave an axe blow on the left side of his chest, appellant Mahesh gave him a lathi blow, thereby causing injuries resulting into his death. Needless to point out that the plea of alibi taken by appellant Mahesh Kumar was rightly rejected by the trial court as his presence, participation and involvement in the incident of assault to complainant Kunjilal as well as to the deceased is reflected from the very beginning, i.e. from the time of lodging of the FIR (Ex.P-4) soon after the incident.

17. However, the involvement and participation of appellant Munna in the later part of the incident in assaulting and causing the death of deceased appears to be doubtful. As mentioned above, the statement made by complainant Kunjilal (P.W-2) that appellant Munna also assaulted the deceased by kharedua on his scalp does not find place in the FIR (Ex.P-4) lodged by Kunjilal (P.W-2) soon after the occurrence. Dr. R.C. Agrawal (P.W-16) also found an incised wound caused by sharp edged weapon on the scalp of the deceased with underlying depressed fracture. No other external injury caused by hard and blunt object like kharedua was found by doctor on the scalp of the deceased. Thus, the statement of complainant Kunjilal (P.W-2) that appellant Munna gave a kharedua blow to his father on his head also does not find corroboration from the medical evidence. In view of the complete omission of this fact in the FIR (Ex.P-4), it becomes highly doubtful that appellant Munna gave a kharedua blow on the scalp of the deceased. The statement of complainant Kunjilal (P.W-2) on this point, therefore, cannot be believed as true. The evidence of other three witnesses, namely, Harisingh, (P.W-6), Rewa Shankar (P.W-7) and Leeladhar (P.W-10) has already been disbelieved. There is no such evidence on record that appellant Munna exhorted or otherwise aided the other appellants in assaulting the deceased and causing his death so as to indicate his participation or sharing the common intention with them in causing his death. Appellant Munna is thus, entitled to benefit of doubt in this behalf.

18. However, as already said, there are no cogent reasons to discard the ocular evidence of complainant Kunjilal (P.W-2) that the other three appellants, namely, Shyam Singh, Kamlesh and Mahesh conjointly assaulted the deceased and thereby intentionally caused injuries on his vital parts resulting into his death. Although the three independent witnesses, namely, Baijnath (P.W-3), Jeevan (P.W-4) and Halkori (P.W-5) have not supported complainant's version and have turned hostile to prosecution, but that by itself cannot be a ground to reject the reliable portion of the testimony of complainant Kunjilal (P.W-2). As observed by the Apex Court in the case of Pattu Lal Vs. State of Punjab, evidentiary value of a

deposition, which is otherwise admissible and reliable is not just wiped out in the absence of corroboration.

19. Learned Counsel for the appellants submitted that the trial court failed to appreciate that appellants Shyam Singh and Kamlesh also sustained injuries in the incident as found by Dr. R.C. Agrawal (P.W-16) on their person, which remained unexplained and that appellant party was in settled possession of the land where complainant Kunjilal tried to encroach upon and make his own "khalihan" and assaulted the appellant party when objected to, and thus right of private defence was available to the appellants. Reliance was placed in this behalf on the decision rendered by the Apex Court reported in Subramani and Others Vs. State of Tamil Nadu, (Laxman Singh Vs. Poonam Singh and Others, (James Martin Vs. State of Kerala, (James Martin v. State of Kerala). There can be no disagreement with the law relating to the exercise of right of private defence as enunciated in the aforesaid decisions cited by learned Counsel for the appellants, but each case has to be examined on its own merits, facts and surrounding circumstance of the case.

20. In the instant case, complainant Kunjilal (P.W-2) deposed that the place where he was making "khalihan" was a Govt. land. He denied the suggestion that appellant party was in possession of that land. There is no such substantive evidence on record that the land where incident took place and where complainant Kunjilal (P.W-2) was making his "khalihan" belonged to the appellant party or they were in settled possession of the land. The oral evidence rendered by Ramlal (D.W-1) examined on behalf of the appellants in this behalf without corroboration from revenue records has no authenticity. There was also no dependable evidence on record that complainant Kunjilal (P.W-2) or his father (deceased) had assaulted any of the appellants and caused injuries to appellants Shyam Singh and Kamlesh so as to give rise to exercise of right of private defence by the appellants. The injuries found by Dr. R.C. Agrawal (P.W-16) on the person of appellants Kamlesh and Shyam Singh were also simple in nature and caused by hard and blunt object.

21. The mere fact that appellants Shyam Singh and Kamlesh had sustained simple injuries would not ipso facto mean that they acted in exercise of right of private defence. It would be profitable to reproduce the following observation made by the Apex Court in this behalf in the case of Naveen Chandra Vs. State of Uttranchal, :

It cannot be stated as a universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probalilise the version of the right of private defence. But mere nonexplanation of the injuries by the prosecution may not affect the prosecution case in all cases. The burden is on the accused to show that he had the right of private defence.

22. Their lordships further observed in the aforesaid case as under:

The right of private defence is essentially a defensive right circumscribed by the governing statute i.e. the IPC, available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed as a pretext for vindictive, aggressive or retributive purpose of offence. It is a right of defence, not of retribution, expected to repel unlawful aggression and not as retaliatory measure.

23. As regards the non-explanation of injuries sustained by the two appellants, the Apex Court has held in its three Judges Bench decision Takhaji Hiraji Vs. Thakore Kubersing Chamansing and Others, that it cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be disbelieved.

24. Thus in the instant case, it could not be established that appellants had acted in the exercise of the right of private defence. The citations referred to by learned Counsel for the appellants, as reported in Munshi Ram and Others Vs. Delhi Administration, (Patori Devi and Another Vs. Amar Nath and Others, (Pohap Singh Vs. State of Haryana and Others, (Pohap Singh v. State of Haryana and Ors.) have turned on the different set of facts and are of no avail to the appellants in the present case.

25. Learned Counsel for the appellant last submitted that the evidence of complainant Kunjilal (P.W-2) itself indicated that the appellants had gone to the place of occurrence for preparing "khalihan" and they had also Jaretha with them on their tractor trolley and when they found complainant Kunjilal was preparing "khalihan" there, an altercation took place between them, the incident occurred on the spur of moment, when the father of complainant Kunjilal intervened in the sudden quarrel, his death occurred in a sudden fight without any premeditation. Thus, according to learned Counsel for the appellants, the case would not go beyond the ambit of Section 304 of IPC as none of the appellants had any intention to kill the deceased. Reliance was also placed in this behalf on the decisions of the Apex Court reported in Jumman and Others Vs. The State of Punjab, (Ram Karan and Others Vs. State of Uttar Pradesh, (Sridhar Bhuyan Vs. State of Orissa, (Kulesh Mondal Vs. The State of West Bengal, (Kulesh Mondal v. State of West Bengal) and it was submitted that Exception 4 of Section 300 of IPC would also be applicable.

26. We have considered the aforesaid submissions. It is manifest from the evidence of complainant Kunjilal (P.W-2) that the incident arose over the issue of making "khalihan" and when the deceased intervened in the quarrel between his son Kunjilal (P.W-2) and the appellants and tried to rescue him, appellant Shyam Singh, Mahesh and Kamlesh, as held above, made assault on the deceased causing injuries resulting into his death. It is obvious from the aforesaid facts that the appellants had no premeditation to kill the deceased and incident

occurred on the spur of moment in a sudden quarrel in the heat of passion without any premeditation. In view of the aforesaid facts, as well as only few injuries caused to the deceased, we are of the opinion that the case of the appellants Shyam Singh, Kamlesh and Mahesh would come within the purview of Section 304 Part I of IPC. The conviction of the three appellants, namely, Shyam Singh, Kamlesh and Mahesh u/s 302/34 of IPC, therefore, deserves to be altered to one u/s 304 Part-I of IPC. Appellant Munna @ Bhawani, however, as discussed earlier, is entitled to benefit of doubt and deserves to be acquitted of the charge u/s 302/34 of IPC.

27. As regards the conviction of the four appellants u/s 324/34 of IPC, in view of clear and cogent evidence of injured Kunjilal (P.W-2) himself against all the four appellants coupled with the corroborative medical evidence indicating injuries caused to him by sharp edged weapon, the conviction of all the four appellants u/s 324/34 of IPC does not warrant any interference in appeal.

28. As regards the sentence, life imprisonment awarded to appellants Shyam Singh, Kamlesh, Mahesh Kumar, in our opinion, deserves to be modified and reduced to a period of rigorous imprisonment for ten years u/s 304 Part I of IPC, with an amount of fine of Rs. 1,000/- (One thousand only), as already imposed by the trial court, in default further rigorous imprisonment for one year. The sentence of rigorous imprisonment for two years awarded to four appellants for the offence u/s 324/34 of IPC, however, looking to the number of injuries caused on the body of complainant Kunjilal, does not call for any interference.

29. Consequently, appeal is partly allowed. The conviction of appellants Shyam Singh, Kamlesh and Mahesh u/s 302/34 of IPC is altered to one u/s 304 Part I read with Section 34 of IPC and the life imprisonment awarded to them is modified and reduced to a period of rigorous imprisonment for ten years with fine of Rs. 1,000/- (One thousand only) each, in default further rigorous imprisonment for one year. The conviction of appellant No. 3 Munna @ Bhawani u/s 302/34 of IPC and life imprisonment awarded to him are set aside and he is acquitted of the charge u/s 302/34 of IPC. We, however, uphold the conviction and sentence of all the four appellants, namely, Shyam Singh, Kamlesh, Munna and Mahesh u/s 324/34 of IPC. Needless to add that the substantive sentence for both the offences shall run concurrently and set off shall be given to them for the period already undergone by each of the appellants.

30. Appellants are on bail. They shall surrender forthwith to their bail bonds to serve out the remaining portion of their sentence.

Appeal is accordingly disposed of.